IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 45

[illegible] Corporation,

Petitioner,

vs.

[illegible], Judge of the United States District Court of the Southern District of California, Central Division,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1957

No. 905.

BEACON THEATRES, INC., a corporation,

Petitioner,

vs.

THE HON. HARRY C. WESTOVER, Judge of the United States District Court of the Southern District of California, Central Division.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introduction.

Under circumstances when the facts justify it it may well be appropriate for this Court to take cognizance of and rule upon what may become (but is not now, as we shall demonstrate later) a conflict between the Circuits as to the proper relationship of Federal Rules of Civil Procedure 18(a) and 42—the former permitting the joinder of legal and equitable claims in a single complaint, and the latter dealing with the trial court's discretion with respect to consolidation and separate trials—and Rule 38(a) preserving the constitutional right to jury trials. However, the record in this case, the Petitioner's gratuitous assertions to the contrary notwithstanding, just

does not support its principal thesis that the Respondent judge by the exercise of the discretion conferred upon him under Rule 42(b) has in fact deprived the Petitioner of a jury trial upon any substantial or material issue raised by its cross-claim under the antitrust laws.

The Factual Background.

Before embarking upon important questions of constitutional law and whether the Federal Rules of Civil Procedure encroach upon the inalienable right to a jury trial, we review briefly the factual background of this litigation as reflected in the record of this case.

This litigation had its genesis in *United States v. Paramount Pictures, Inc., et al.*, 334 U. S. 131, 92 L. Ed. 1260, 68 S. Ct. 915, which became the progenitor of the vast number of treble-damage suits to which the cases in the Federal Reports bear silent testimony.

Actual litigation in the form of innumerable treble damage actions was not the only offspring born of the *Paramount* case, however; the threat of litigation itself became and is a potent weapon in the hands of so-called "independent" exhibitors to obtain concessions from the major distributors of motion pictures, the defendants in the *Paramount* case; concessions that are neither economically justifiable nor legally required. Such a case is the present one.

The *Paramount* decision had given judicial recognition to the rather patent economic fact that a motion picture cannot profitably—or indeed at all—be shown simultaneously in all theatres; accordingly, as alleged in the complaint at bar, the defendants in the *Paramount* case were permitted to grant a priority of run to a theatre

found to be "in substantial competition" with a competitive theatre and a clearance over the next succeeding run, reasonable as to time and area, was found to constitute a justifiable restraint of trade [Par. VII of Complaint, R. 18-21].

Cognizant of the impracticality of attempting to judicially govern the detailed facets of motion picture distribution throughout all areas of the United States, the *Paramount* case further decreed that "the decision of such controversies as may arise over clearances should be left to local suits in the area concerned" [R. 19].

When Beacon Theatres, Inc. built its theatre—a drive-in—within a scant twenty minutes from downtown San Bernardino where Fox West Coast Theatres Corporation operated its California Theatre, and demanded, under threats of antitrust litigation, the right to exhibit any motion picture at the same time as the California Threatre or any other theatre in the area might exhibit it (thereby diluting the patronage at both theatres if they were in fact competitive for any substantial portion of the same theatre-going public), Fox West Coast was faced with three alternatives: It could capitulate to the threats and reconcile itself to absorb the consequent loss; it could sit by hoping that the distributors of the pictures would not be cowed and wait for the threatened lawsuit, trusting eventually that it or the distributors would win it; or it could do as it did here. It sought the relief of the District Court for the Southern District of California and asked it to abate the economic duress and threats of antitrust litigation being levied by Beacon Theatres if its demands for preferential treatment were not acceded to, and to adjudicate for the benefit of all concerned whether in fact

there existed that substantial competition between the California Theatre and the new Drive-in as would justify the *Paramount* defendants in permitting *either* threatre to negotiate and compete for the license of a picture for exhibition ahead of and with clearance over the other threatre.

The Cross-Claim for Treble Damages Under the Antitrust Laws.

Faced with the request that its threats of antitrust litigation be enjoined and the leverage of those threats be dissipated, the Petitioner, after exhausting various dilatory tactics against the complaint for declaratory and injunctive relief, such as motions to dismiss for failure to state a claim and for lack of jurisdiction of the court, filed a cross-claim for $300,000 treble damages, alleging a conspiracy in restraint of trade by Fox West Coast, Pacific Drive-In Theatres, Stanley-Warner Theatres and the major distributors of motion pictures to prevent the new Drive-in from getting first-run pictures in the area.

It should not have to be the province of this Court to have to examine, analyze and interpret pleadings in an interlocutory proceeding before trial or judgment in the District Court. Suffice it to say that in the cross-claim for treble damages alleging a conspiracy in restraint of trade and to monopolize [the pertinent allegations of which are to be found in R. 50-52], the issue of competition between the same theatres for much of the same patronage is nowhere raised, and its resolution as a question of fact by the Court on the complaint for injunctive and

declaratory relief if determinative of anything on the cross-claim would go only to the quantum of damages alleged to have been sustained.[1] The burden of the cross-claim for damages is based, as it would have to be, upon a wrongful conspiracy in restraint of trade and asserts that Fox West Coast, Pacific Drive-in Theatres and Stanley-Warner Theatres had conspired to obtain and retain all of the first-run pictures for themselves in the San Bernardino area. A jury trial was demanded on the issues raised by both the complaint and the cross-claim.

The Separation of the Issues and Separate Trial Granted by the Respondent Judge.

The trial judge, with a fortitude which, but for the glaring inadequacies of the present Petition, we would wish to see commended by this Court, saw through the patent strategy of the Petitioner and refused to permit the simple issue (of the presence or absence of substantial competition between two theatres) and the equitable appeal made to him (to enjoin continued thr[illegible] against the Paramount distributors) to become obfuscated

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[1]If the Respondent judge finds the theatres to be competitive, as Fox West Coast contends in its complaint for injunctive and declaratory relief, the finding would militate in favor of the Petitioner should it ultimately establish the wrongful conspiracy to deprive it of first-run pictures it alleges in its cross-claim. If the Respondent judge were to find that the theatres were not substantially competitive, as the Petitioner contends in its answer to the complaint [R. 38], this would of course constitute no defense to the charges of conspiracy in restraint of trade and to monopolize, but might reflect upon the damages which Petitioner asserts it has sustained by reason of the alleged violation of the Sherman Act, for clearly if the allegedly "favored" theatres were not competitive to the new Drive-in it could not have been greatly harmed by the alleged discriminations against it.

in the illimitable generalities and inevitable delays of a time-consuming antitrust trial before a jury.[2]

Having pleaded a meritorious case for injunctive and declaratory relief, the Respondent Judge concluded that Fox West Coast should be entitled to have its case heard and decided as presented,[3] and that if there were any merits to Beacon Theatre's general charges of antitrust violations they might have their full day in court at a later date to prove them to a jury. In his Response to the Order to Show Cause why the Petition for Writ of Mandamus should not be granted, the trial judge succinctly stated the basis for his ruling:

> "(3) In separating the issues in said action and in ordering an early trial of the issues raised by the complaint of plaintiff therein, respondent was performing a judicial act within his jurisdiction and discretionary power and was thereby exercising his said judicial discretion and fully performing his judicial functions and duties in accordance with Rules 57 and 42b of the Federal Rules of Civil Procedure. That it was and is the position of respondent that plaintiff may not be deprived of its prerogative of

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[2]Mr. Moses Lasky characterizes the burden of defending against antitrust charges in 43 Cal. Law Review at page 598:

> "With the Long Bow aimed at a defendant's heart by our modern merry Robin Hoods, the preparation of the defense of an antitrust case becomes, if not an almost impossible or superhuman task, at least a costly one. To what shall counsel address his investigation? What evidence shall he prepare to meet, to explain, to supplement? The answer is everything. Anything at all."

[3]F. R. C. P. Rule 57 provides in part: "The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar."

securing an early judicial declaration of its rights by the Court as presented by its complaint for declaratory judgment by the expedient of a Cross-Claim under the anti-trust laws raising wholly different and divergent issues from those raised by the complaint and answer thereto and upon which Cross-Claim a jury trial is demanded." [R. 115.]

The trial judge was further meticulously careful to preserve to the Petitioner intact its right to a jury trial upon the issues raised by its cross-claim for antitrust violation, striking for that purpose the affirmative defense and allegations of the same antitrust violations from Petitioner's answer to the complaint, to the end that none of the material issues similarly raised by the cross-claim might be prejudged by the court in the action for injunctive and declaratory relief. In this respect the trial judge stated in his Response to the Order to Show Cause:

"(2) Respondent has not and does not propose to deny to defendant a jury trial upon the legal issues presented by its Cross-Claim.

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"(4) Contrary to the averment contained in Paragraph XI of petitioner's Petition for Writ of Mandamus; a determination of the issues raised by the complaint in said action will not serve as an adjudication of the basic issue raised by defendant's Cross-Claim, to wit, that of conspiracy to restrain trade which will remain undecided until the trial of the issues raised by said Cross-Claim." [R. 115.]

I.

There Is No Common Substantial and Material Issue Between the Antitrust Cross-Claim on Which Jury Trial Has Been Preserved and the Complaint for Declaratory and Injunctive Relief.

The trouble with the present Petition is that throughout its length it attempts to mould this case into the framework of what have rather facilely been termed "juxtaposition of the parties" cases; that is, to quote the usual case, an insurer having a defense such as material misrepresentation to its liability on the policy beats the insured into court in an action for declaratory judgment to have the policy annulled. Almost without exception the courts have sustained the insured's right to a jury trial and, as pointed out in the Petition, have held that after loss on the policy has occurred the insurer has an adequate remedy at law as a defense. See for example *Di Giovanni v. Camden Fire Ins. Assoc.*, 296 U. S. 64, 80 L. Ed. 47, 56 S. Ct. 1; *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, 87 L. Ed. 176, 63 S. Ct. 163 and other cases cited pages 21-23 of the Petition; and see such statements as the following from page 25 of the Petition:

> This is true because in this action, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant had intended to assert as a complaint and has in fact asserted as a counterclaim. Fox West Coast here, has sought to anticipate imminent legal action by petitioner by seeking a declaratory judgment to the effect that it would have a good defense when that cause of action was asserted. Where the complaint in an action for

declaratory relief seeks in essence to assert a defense to an impending or threatened complaint at law, it is the character of the threatened complaint at law, and not of the defense, which will determine the right to jury trial."

We have no quarrel whatever with these rather elemental propositions; but unfortunately for Petitioner they are completely foreign to the issues presented in this case.

Again, we reiterate that this Court should not be called upon to analyze pleadings and the issues raised by them, but it becomes unfortunately necessary when the Petition fails to correctly state them. The Complaint for Declaratory Judgment was the very antithesis of an anticipatory defense to an anticipated antitrust suit. The burden of the complaint was that Fox West Coast deemed its California Theatres and the Petitioner's Drive-in to be sufficiently competitive as would justify *either* theatre in negotiating with the *Paramount* defendant distributors for a prior run of a picture over the other but that Petitioner was interfering with this right to compete by its threats that if any distributor awarded the California Theatre a prior run and did not give the Drive-in the right to play the picture simultaneously, it would bring action under the antitrust laws and treat such act as an "overt act in concert with any distributor who may grant plaintiff (Fox West Coast) such clearance or such priority of run in restraint of trade and a violation of the Sherman Antitrust Act and of the decrees" in the *Paramount* case [R. 23-24]. The complaint proceeded to allege:

"That said threats and the duress and coercion upon the Distributors arising out of and resulting from said threats of litigation threaten to and have in fact deprived plaintiff and its said California

> Theatre of the right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run, including defendant's Bel-Air Drive-In Theatre." [R. 24.]

The Complaint prayed:

> "2. That it be decreed that the Distributors are and each of them is entitled to negotiate with plaintiff and defendant and with other owners and operators of theatres in said competitive area equally for a prior run in said competitive area." [R. 25.]

How the Petitioner could torture these clear allegations seeking a clarification of the plaintiff's *right to compete* against Petitioner's Drive-in into an anticipatory defense to a cross-claim for treble damages charging a conspiracy to *prevent Petitioner from competing* for first-run pictures [R. 50-52], may be a tribute to the ingenuity of counsel but nonetheless remains a mystery. To illustrate the hollowness of the claim that Fox's defense to the antitrust charge is being prejudged by the Court without a jury, one has only to imagine Fox West Coast defending the allegations of conspiratorial monopolization of first-run pictures in the area by asserting loudly, "We cannot be liable because the judge has found that the theatres involved are substantially competitive"! In short, as shown above, the issue of competition or absence of competition between the theatres for the same potential pool of theatre-goers has not the slightest bearing on whether Fox West Coast and its alleged companion conspirators may have conspired in violation of the Sherman Act. The whole argument of the Petitioner is a sham.

It is true the opinion in this case states: "The complaint, as noted, presents the issues as to the existence of substantial competition between the parties in the San Bernardino area. This is also an issue raised in the counterclaim." [R. 188.] It is an issue raised in the counterclaim but only in the most incidental sense, in that if the conspiracy in restraint of trade is proved the damage impact upon the Petitioner's Drive-in will be less if there is no real competition between the theatres for the same patronage (as Petitioner contends) than if the Court finds there to be substantial competition between them (as Fox West Coast contends). If this is an unconstitutional deprivation of jury trial then the Seventh Amendment would stand as an effective block in virtually any and every suit in equity to which any unrelated and dissimilar cross-claim at law might be interposed. It is a sure way to have every equity case tried to a jury.

If it be suggested that the question of competition between the theatres is relevant to the "clearance" charge of the antitrust cross-claim [see "overt act No. 4", R. 51], the answer is furnished from the pleading itself. The cross-claim charges that the unlawful conspiracy and attempt to monopolize consisted of a continuing agreement between the conspirators:

> "4. To impose clearance in favor of said protected theatres of Fox West Coast Theatres Corp., Pacific Drive-in Theatres Corp. and Stanley-Warner Corporation in San Bernardino against independent outsiders, including defendant's Belair Theatre, for the purpose of protecting the monopoly of first-run exhibition and first-run patronage conferred on the theatres of Fox West Coast Theatres Corporation, Pacific Drive-in Theatres Corporation and Stanley-

Warner Corporation, and for the purpose of protecting said theatres from competition." [R. 51.]

Conceding that a grant of clearance between theatres in substantial competition is a reasonable restraint as found in the *Paramount* case [R. 19-20], it is clearly not such if, as alleged in the cross-claim, it is granted pursuant to a continuing conspiracy, to protect the alleged first-run monopoly of the conspirators. Obviously, a finding of competition between the theatres, if such should be made by the Respondent judge, would be no defense to this charge of malefaction; it would, if anything, aggravate it. If he finds no competition between the theatres, the alleged conspiracy to exclude the Petitioner's theatre from first-run privileges, if proven, would certainly be no less wrongful.

Here again, the application of only the simplest process of reasoning betrays the fallacy of the whole thesis of the Petition, that the issues in the two actions are the same or even overlap. We descend to this elementary exposition to give the lie to such irresponsible statements as: "if the Court determines to try the anti-trust issues under the equitable claim for an injunction first that Rule 42b provides the source of such power even though the effect is to destroy the right of jury trial" (Pet. p. 19).[4] There is not the remotest resemblance to any "juxtaposition of the parties" in this case and no anti-trust issue on the pleadings in this record is going to be foreclosed by the Court's findings on the existence or absence of substantial competition and no one should know it better than counsel for the Petitioner.

[4]Equally out of tune with the issues presented by the pleadings is the statement from p. 25 of the Petition, quoted *supra*, pp. 8-9;

Other Misconceptions of the Issues Presented.

Whether purposely done we know not, but the Petition again and again confuses the issues that this Court is asked to review. For example, citing *Prudential Insurance v. Saxe*[5] and *Phoenix Mutual Life Insurance Co. v. Bailey*,[6] the Petition observes "when a defense could be interposed to an action at law and such action was imminent or pending there was no occasion for equitable relief" (Pet. p. 21). Of course, not; but what has that got to do with this case? What defense would it be to the antitrust allegations of the counterclaim charging conspiratorial discrimination in favor of the Fox-owned theatre for Fox West Coast to prove that the theatres were in substantial competition one to the other? In fact, a jury verdict on the counterclaim either in favor of Petitioner or of Fox West Coast would shed no necessary light at all on the controversy the plaintiff is seeking to have declared—whether the parties are free to negotiate for a prior run for one theatre over the other within the proscriptions of the *Paramount* decrees.

Another example of seemingly purposeful obfuscation in the Petition appears at pages 26 and 27 where the Petitioner discusses patent cases involving the patentee's threats of infringement actions against the defendant's customers and which hold in effect that the determination of whether there is an infringement in fact will abate the threats. Such cases may be interesting, but they have nothing whatsoever to do with the issues here, where the complaint alleges the wrongful interference with a

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[5]C. A. D. C. 134 F. 2d 16.

[6]13 Wall. 616, 80 U. S. 616, 20 L. Ed. 501.

valuable property right of the plaintiff, to-wit, the right to be free to negotiate with the distributors of motion pictures for a prior run of a picture. The opinion meets this issue head on when it states:

> "Turning then to the complaint in this case, it is there manfiest that Fox seeks protection for its 'right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run including defendant's Bel-Air theatre.' The authorities which we have cited disclose that a right so to negotiate, sufficiently partakes of the nature of a property right or sufficiently resembles a property right as to be entitled to protection through the use of the injunctive process against intentional and wrongful acts calculated to destroy it, provided only that there is not a complete or adequate remedy at law." [R. 184.]

The opinion goes on to conclude that there was no adequate remedy at law when the complaint was filed, and in its footnote 10 [R. 187] demonstrates that even the prior filing of the antitrust suit would not have furnished an adequate remedy at law.

We would prefer to see the Petitioner meet these clearly stated issues than indulge in the irrelevant excursions with which its Petition is so replete.

II.

There Is No Conflict Between the Circuits in This Case.

The principal reason advanced for this Court to grant certiorari is that the Beacon case adds yet another to the list of Circuit Court decisions of the First and Ninth Circuits substantially in conflict with the decision of the Eighth Circuit in *Leimer v. Woods*, 196 F. 2d 828.

In the first place, if there is any such conflict, the present case upon its facts represents an inadequate vehicle for a resolution of the conflict.

The opinion in this case, after quoting Rule 42b, states:

> "The question is whether, notwithstanding that provision, some other rule or requirement relating to the right to trial by jury prohibited the Respondent from directing that the issues raised by the complaint be first tried by the Court without a jury and that the issues raised by the counterclaim be tried subsequently. There is no doubt that that procedure, if carried out, will operate *in some degree* to limit the Petitioner's opportunity *fully* to try to a jury *every issue* which has a bearing upon its treble damage suit. The complaint, as noted, presents the issues as to the existence of substantial competition between the parties in the San Bernardino area. This is also an issue raised by the counterclaim." [R. 187; italics ours.]

We have adverted above to the extremely limited role played by the question of substantial competition between the theatres upon the broad issues raised by the antitrust cross-claim, observing that at best a finding upon the presence or absence of substantial competition can reflect

only upon the impact upon the Petitioner's Drive-in Theatre of the conspiracy charged. The court in *Leimer v. Woods*, took pains to note, page 836:

> "In summary, a federal court may not under the Rules of Civil Procedure, in a situation of joined or consolidated equitable and legal causes of action, *involving a common substantial question of fact*, deprive either party of a properly demanded jury trial upon that question, by proceeding to a previous disposition of the equitable cause of action and so causing the fact to become res judicata, unless there exist special reasons or impelling considerations for the adoption of such a pre-empting procedural course in the particular situation." (Italics ours.)

As noted above, the existence or non-existence of substantial competition between theatres is not a common *substantial* question of fact, and we believe from the portion of the opinion of the Ninth Circuit Court quoted above that while it regarded the question of competition to be a common fact issue, it did not regard it as a substantial issue.

Furthermore, the *Leimer* case excepts from its holding cases where "there exist special reasons or impelling considerations for the adoption of such a pre-empting procedural course in the particular situation." The Court of Appeals in the Beacon opinion similarly conditions the exercise of the Court's discretion under Rule 42b by the considerations suggested by this Court in *American Life Insurance Co. v. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605, that is, "whether plaintiff was precipitate or defendant dilatory, the condition of the court calendar, and the benefits and hardships involved." [R. 195.] The Respondent judge predicated the exercise of his discretion under Rule 42b upon the ground,

"that plaintiff may not be deprived of its prerogative to secure an early judicial declaration of its rights by the court as presented by its complaint for declaratory judgment by the expedient of a Cross-Claim under the anti-trust laws raising wholly different and divergent issues from those raised by the complaint and answer thereto. * * *" [R. 115.]

We submit, that in the posture of the present case here is in fact no conflict between the *Leimer* decision nd the present case. As stated by the commentator in note, 39 Iowa Law Review 350, discussing the *Orenein*[7] and *Leimer* lines of authority, the difference is at est but one of degree, page 353:

"Therefore, it is seen that under both the *Orenstein* and *Leimer* views a trial court is given some discretion as to the order of trial. The difference between these views is in the degree of discretion given to the court. The *Orenstein* view allows the court to determine the order of trial in its *absolute discretion* regardless of any sound reason to try the equitable claim first.[8] The *Leimer* view cuts down this discretion so that there must first exist some *compelling reason* for trying the equitable claim first. The problem raised by these cases is the question of the degree of discretion allowed the trial court."

If the distinction is, as suggested, the degree of discretion allowed the trial court, we suggest that the reasons which impelled the Respondent trial judge to sepa-

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[7]191 F. 2d. 184.

[8]We question the soundness of this interpretation in view of the well-settled rule that judicial discretion is never mere whim or caprice but must have facts to support and justify it.

Stanton v. United States (C. A. 9), 226 F. 2d 822, 823;

Smaldone v. United States (C. A. 10), 211 F. 2d 161, 163.

rate the issues of the complaint for declaratory and injunctive relief and to attempt to grant plaintiff an early trial upon those issues in advance of the cross-claim for treble damages, were sufficient in themselves to have met the more stringent limitations posed by the *Leimer* case.

There was still another compelling reason for the trial judge to have separated the issues and granted separate trials. The foundation of the action brought by Fox West Coast lay in the injunctive provisions in the *Paramount* case under which the distributors were precluded from granting clearance except as between theatres in "substantial competition" to each other [see allegations, R. 20]. Thus Fox West Coast would be required to introduce into evidence the decrees in the Government case. Were its action to be tried before a jury concurrently with the antitrust cross-claim, material prejudice would result from the jury having before it the adjudications in *United States v. Paramount*. Upon a separate trial of the antitrust cross-claim, in view of the fact that Petitioner's theatre did not commence doing business until November of 1956, the *Paramount* decrees would not be admissible in evidence because relating to a period long subsequent to the effective date of the *Paramount* findings. (*Paramount Film Distributing Corp. v. Village Theatre* (C. A. 10), 228 F. 2d 721, 727; *Steiner v. Twentieth Century-Fox Film Corp., et al.* (C. A. 9), 232 F. 2d 190; *Hillside Amusement Co. v. Warner Bros, et al.* (C. A. 2), 224 F. 2d 629, 630.)

We conclude, therefore, that the justification for the separate trials of the two distinct actions would have fallen well within the ambit of the discretion of the trial judge allowed by the *Leimer* decision and that in fact this case presents no conflict between the circuits.

III.

The Right to a Jury Trial Has Been Preserved to Petitioner, Not Denied to It.

All parties are agreed that the adoption of the Rules was not designed to affect the substantive rights of litigants as they existed prior to the Rules and, as Petitioner points out, Section 2 of the Enabling Act (Pet. App. A, p. 2) expressly provided that in the union of rules between law and equity the right of trial by jury as at common law and declared by the Seventh Amendment shall be preserved. Contrary, however, to Petitioner's claim, the approbation given in this case to the exercise of his discretion by the trial judge to separately try the issues of the complaint in equity from the issues of the cross-claim, the latter to be tried to a jury, preserves for the Petitioner its right to jury trial to an extent greater than existed prior to the Rules.

Before the Rules, setting up a legal counterclaim to a suit in equity automatically forfeited the defendant's right to a jury trial on its counterclaim. *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 366, 43 S. Ct. 149, 67 L. Ed. 306, 309; *Horwitz v. New York Life Ins. Co.* (C. A. 9), 80 F. 2d 295, 301:

> "Defendant was not obliged to assert a legal counterclaim in an equitable action, but, having done so, he has waived his right to a jury trial and put the entire case in equity. American Mills Co. v. American Surety Co., 260 U. S. 360, 366, 43 S. Ct. 149, 67 L. Ed. 306; Clifton v. Tomb (C. C. A.), 21 F. (2d) 893, 898."

In this case, in the exercise of the discretionary power conferred upon him by Rule 42(b) the Respondent Judge has preserved to the fullest possible extent Petitioner's

right to a jury trial on its antitrust cross-claim—a right which prior to the Rules it would have lost—while at the same time preserving to the plaintiff its right to what was intended to be an expeditious determination of a controversy threatening plaintiff with what it claimed would result in irreparable injury and against which it had no adequate remedy at law [R. 24]. To refuse to permit plaintiff's rather simple but nonetheless urgent request for declaratory and injunctive relief to become lost in the vague charges, inferences from business conduct and insinuations inherent in a general claim of mohopoly and conspiracy tried to a jury, we submit was the soundest possible exercise of its discretion by the trial court and the Court of Appeals was eminently correct in refusing to interfere with that discretion by mandamus.

IV.

Appeal, Not Mandamus, Is the Proper Means of Reviewing the Claimed Error.

The present Petition represents a classic illustration why interlocutory appeals, in the form of an application for an extraordinary writ before judgment, have always been and are now so greatly discouraged by the courts.[9] We have it on the Petitioner's say-so only that an important and substantial question of fact is common to both the action for declaratory and injunctive relief and the antitrust cross-claim and that hence Petitioner will

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[9]See—*Parr v. United States*, 351 U. S. 513, 520, 100 L. Ed. 1377, 76 S. Ct. 912; *Bankers Life and Casualty Co. v. Holland*, 346 U. S. 379, 382, 98 L. Ed. 106, 74 S. Ct. 145; *Ex parte Fahey*, 332 U. S. 258 260, 91 L. Ed. 2041, 67 S. Ct. 1558; *United States Alkali Export Asso. v. United States*, 325 U. S. 196, 202, 89 L. Ed. 1554, 1560, 65 S. Ct. 1120; *Roche v. Evaporated Milk Asso.*, 319 U. S. 21, 26, 87 L. Ed. 1185, 1190, 63 S. Ct. 938.

be deprived of a jury determination on this issue. We controvert this unsupported assertion and have shown that from the pleadings (all that the parties have to turn to at the present juncture) the question of the existence or absence of competition between the theatres can have but little if any bearing on the antitrust allegations; that competition or lack of competition between the theatres would constitute no defense nor even mitigation if Petitioner can make good on its allegations that the cross-defendants and the major distributors of motion pictures conspired to perpetuate a first-run monopoly in behalf of certain favored theatres in the San Bernardino area, that they conspired to discriminate against Petitioner's theatre and that they agreed not to compete against each other.

Had Petitioner been content to await judgment on its cross-claim it would then have been in a position on a trial record to demonstrate whether or not it had been prejudiced in fact, by the exclusion of evidence or otherwise, by a predetermination by the court of the question of substantial competition between the theatres, thereby eliminating that question from jury consideration. The Circuit Court should not, and *a fortiori* this Court should not, be called upon to weigh assertion against counter-assertion and to interpret pleadings and counter-pleadings under The All Writs Act (28 U. S. C. A., Sec. 1651) without the benefit of a trial record to determine whether the plaintive cry of deprivation of jury trial has any substance to it. Had it come to the question, we are satisfied that the Circuit Court would have denied the Writ of Mandamus here as an inappropriate interlocutory remedy.

At the expense of a rather lengthy quote, we repeat what this Court had to say respecting the office of a Writ of Mandamus in *Banker's Life and Casualty Co. v. Holland*; 346 U. S. 379, 98 L. Ed. 106, 74 S. Ct. 145, where in affirming denial of the writ it was said, p. 382 of 346 U. S.:

"The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U. S. C. §1651(a). As was pointed out in Roche v. Evaporated Milk Asso., 319 U. S. 21, 26, 87 L. ed. 1185, 1190, 63 S. Ct. 938 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. * * * Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, Roche v. Evaporated Milk Asso. (U.S.) supra, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than

used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in De Beers Consol. Mines v. United States, 325 U. S. 212, 217, 89 L. ed. 1566, 1572, 65 S. Ct. 1130 (1945). This is not such a case.

"It is urged, however, that the use of the writ of mandamus is appropriate here to prevent judicial inconvenience and hardship occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as substitutes for appeals. Ex parte Fahey, 332 U. S. 258, 269, 91 L. ed. 2041-2043, 67 S. Ct. 1558 (1940), even though hardship may result from delay and perhaps unnecessary trial. United States Alkali Export Asso. v. United States, 325 U. S. 196, 202, 203, 89 L. ed. 1554, 1560, 1561, 65 S. Ct. 1120 (1945); Roche v. Evaporated Milk Asso., supra (319 U. S. at 31); and whatever may be done without the writ may not be done with it. Ex parte Rowland, 104 U. S. 604, 617, 26 L. ed. 861, 866 (1882). *We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action* and will give rise to a myriad of legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated those conditions in providing that only final judgments are reviewable. Petitioner has

alleged no special circumstances such as were present in the cases which it cites.

* * * * * * * * *

"We adhere to the language of this Court in Ex parte Fahey, supra (332 U. S. at 259, 260):

"'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes.'" (Italics ours.)

The purpose of Rule 42b, which of course is based upon the need for the orderly administration of the business of the trial court, is to repose discretion in the trial judge to the end that he may most efficiently dispose of the judicial business before him. No appellate court should, nor would it desire to, interfere with this function of the trial court, particularly in an interlocutory proceeding before trial where error, if any, can be fully reviewed on appeal. As the same Court of Appeals observed in *Institutional Drug Distributors v. Yaukwich*, 249 F. 2d 566, a strikingly similar application for a Writ of Mandamus prosecuted by the same counsel representing Petitioner here, page 570:

"Therefore, the District Court must not be trammeled by premature expressions on our part. If a mistake be made, there are methods of correction, which are no more expensive than retrials, which this Court has been compelled to order in other

cases. The District Court has the full record before it and must determine whether Institutional was ever entitled to a jury trial and whether that right, if any, has been waived or still exists.

* * * * * * * * *

"This Court should not interdict a trial unless it is demonstrated that a right of petitioner has been infringed. We are bound to assume that the trial court is proceeding properly. There has been no showing to this Court that, if it be assumed Institutional had a right, appeal from the final judgment or some other course would be a clearly inadequate remedy.

"As it is, we are haunted by the specter of multiple appeals to this Court. That is indeed an evil. To avoid such appeals in this and other cases, no action should be now taken.

"The application to file a petition for writ of mandamus is denied."

Conclusion.

Certiorari should not be granted on a record as indefinite and uncertain as the present where in effect we have nothing more than the Petitioner's gratuitous assertion that it is being denied a jury trial upon an important fact issue in its cross-claim under the antitrust laws. The pleadings and the application of common sense belie the fact that the presence or absence of substantial competition between the theatres involved will be either determinative of or material to the charges of conspiracy to keep first-run pictures from the Petitioner, to favor the alleged conspirators and to discriminate against Petitioner's theatre or to eliminate competition between the alleged conspirators themselves.

Moreover, if there is any conflict in the Circuit Court decisions as to the factors which should govern the trial court's discretion with respect to the order in which equitable and legal issues should be tried, this case does not truly reflect the conflict because we are satisfied that no different result would have been reached had the Eighth Circuit considered the Petition for Mandamus in this action.

The Petitioner has succeeded in delaying the early trial of the Plaintiff's action for declaratory and injunctive relief which Rule 57 contemplates for a period of more than eighteen months and its Petition for a Writ of Certiorari should be forthwith denied.

Respectfully submitted,

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